

CHAPTER 8

RECOMMENDATIONS

In June 2000, the Judicial Council of California contracted with Policy Studies Inc. to conduct a review of the state's child support guideline. That review included the following activities:

- The collection and analysis of child support order information from case files;
- A review of the provisions that other states' guidelines make for selected issues, in particular low-income obligors, second families, and the use of gross or net income to calculate the support obligation;
- Administration of a survey of people who use the guideline (for example, judges, family law attorneys, and advocates for parents and children) to establish and modify support orders;
- An analysis of the costs of raising children; and
- Focus groups and interviews with parents who have experience with the guideline.

The summary of findings from these activities is included in the preceding sections of this report. In this section, recommendations are provided for three key guideline issues that were the primary focus of the review. Those issues include:

- Treatment of low-income obligors;
- Use of gross or net income as a base to use in calculating the child support obligation; and
- Treatment of additional dependents.

These recommendations to the Legislature indicate those areas where the existing statutory scheme appears to be functioning adequately, those areas where specific changes should be considered in the interest of the administration of justice, and those areas where the existing statutory scheme appears to need modification based upon the Legislature's review of various remedial options.

TREATMENT OF LOW-INCOME OBLIGORS

Background

There are three provisions in the existing guideline of most relevance to low-income obligors.

Low-Income Adjustment

The court must rule on whether a low-income adjustment shall be made if the obligor's net income is less than \$1,000 per month. If the court rules in favor of the adjustment, it shall reduce the formula-determined support amount by an amount that is no greater than the formula-determined amount multiplied by a fraction, the numerator of which is 1,000 minus the obligor's net monthly income and the denominator of which is 1,000 (Fam. Code, § 4055(b)(7)). The court then has the discretion of ordering an amount anywhere within the range of the formula amount and the result of the above calculation. The court must justify the allowance of the low-income adjustment by indicating on the record or in writing the reasons for the adjustment and the supporting underlying facts.

Automation of the Low-Income Adjustment

The California Family Code provides that if the court uses a computer to calculate the child support order, the computer program shall not automatically default affirmatively or negatively on whether a low-income adjustment is to be applied. If the low-income adjustment is applied, the computer program shall not provide the amount of the low-income adjustment. Instead the computer program shall ask the user whether or not to apply the low-income adjustment, and, if answered affirmatively, the computer program shall provide the range of the permitted adjustment (Fam. Code, § 4055 (c)).

Presumed Income

The Family Code addresses the situation where the obligor's income is unknown and the order is being established by a local child support agency. If the obligor's income or income history is unknown to the local child support agency, income shall be presumed to be an amount that results in a court order equal to the minimum basic standard of adequate care for the supported child or children (Fam. Code, § 17400(d)(2)). A schedule of support order amounts is published annually that links presumed income and respective presumed order amounts. In state fiscal year 1999–2000, for example, the presumed income for an obligor with one child to be supported was \$1,966 per month. The child support order amount for that income level was \$390 per month.

Overview of the Low-Income Issue

There are four questions the Judicial Council must address in reviewing how the guideline treats low-income obligors.

- Is the threshold the guideline uses to determine eligibility for a low-income adjustment to the support order adequate?
- Is the method used to adjust the support order appropriate?
- Should the adjustment threshold and adjustment amount be presumptive or advisory on the court?
- What income should be presumed when the obligor's income is unknown and the support order is being established by the local child support agency?

Low-Income Threshold

A common theme in the responses to the survey of guideline users was that the threshold of \$1,000 net income per month for application of the low-income adjustment is too low. When asked what changes the individuals being surveyed would recommend to the low-income adjustment, the highest income threshold recommended was \$3,000 net income per month. Other respondents recommended that the guideline include a threshold range that took into account differences in the cost of living among California's counties. In their opinion, the threshold of \$1,000 may work in some counties, but not in others.

A comment by the California Department of Child Support Services noted that the low-income adjustment threshold may need to be revised considering California's new minimum wage, effective January 1, 2002. A full-time minimum-wage worker may be either ineligible for a low-income adjustment or the adjustment will be a very small amount.

Although each state is unique, it should be noted that the existing obligor threshold of \$1,000 net income per month is on the high end relative to other states. As displayed in Chapter Four, the income threshold many states use before they establish minimum order amounts is \$617 per month net income. This is equivalent to the federal poverty level for one person in 1998. In high-income states (such as New York and Connecticut), the threshold is higher. In New York, for example, the low-income adjustment formula is 135 percent of the federal poverty level for one person, which for 2001 puts it at \$966 net income per month. In Connecticut, the income threshold used for applying the low-income adjustment varies depending upon the number of children for whom support is being awarded. For obligors with one child, the threshold is \$953 net income per month, while for six children the threshold is \$1,689 per month.

Self-Support Reserve

Most states allow the obligor a self-support reserve; that is, enough income after the payment of child support and taxes to maintain at least a subsistence level of living. Typically, this amount is related to the federal poverty guideline for one

person. (The 2001 poverty guideline for one person is \$716 net income per month.) The support order is set at the difference (or a proportion of the difference) between the obligor's net income and the self-support reserve (see Exhibit 4-3 for a state-by-state summary). Another approach is demonstrated by the now-repealed Agnos Child Support Standards Act of 1984, in which California provided a self-support reserve for the paying parent based upon the minimum basic standards of adequate care (MBSAC). MBSAC is a figure calculated to take into account the amount of money needed to meet a person's basic needs as determined by the California State Department of Social Services (see Welf. and Inst. Code, § 11452). This figure is adjusted each year and is currently \$402 per month.

The current California guideline does not allow a self-support reserve for the obligor. Therefore, it is feasible for an obligor with net income above \$1,000 per month—hence, ineligible for the low-income adjustment under the California guideline—to be left with income below the poverty level. This is particularly true for cases with three or more children or for cases with additional child-related expenditures (for example, for child care or extraordinary medical expenses). The following scenario is a good example: the parents have three children, their incomes are equal (\$1,100 per month net), and the paying parent has primary physical responsibility for the children 20 percent of the time. Using the guideline formula, the monthly child support obligation would be \$396. After payment of the child support order, the obligor would have available income of \$704, which puts him or her below the 2001 federal poverty level for one person.

Another issue, and one that other states' guidelines address, is whether the self-support reserve should be made before or after add-ons (such as for child care, extraordinary medical expenses, and other additional child-related expenses). Most states that incorporate a self-support reserve and low-income adjustment apply them before the add-ons are applied. However, in some situations, where the self-support reserve is applied before adding the add-ons to the base support, the paying parent may actually be left with income substantially below the self-support reserve. For instance, this could be the case using the above example of the paying parent with three children if there was a child-care add-on of \$300. The paying parent has net monthly income of \$1,100 per month and a base child support obligation of \$396 for three children. This obligation would leave the paying parent with \$704 per month. If the federal poverty guideline was used as the self-support reserve (\$716 for one person), the base child support would be reduced to \$384 in order to allow the parent a self-support reserve equal to the poverty level. However, if there was an order for the parties to share an additional \$600 per month in child care (\$300 paid by each parent), the paying parent would then be left with \$416 per month, which is well below the poverty level.

Discretionary Application

As evident from the case file review findings, the low-income adjustment is applied infrequently (that is, in 6 percent of the eligible cases). It is not certain why the frequency is so low. One possible explanation is that the low-income adjustment formula is too complex to compute manually, although no one mentioned that problem in the responses to the guideline users' survey. The user of the automated guideline computer program must affirm that the low-income adjustment is to be applied before the support order is calculated. This, in itself, may be a problem, since the person using the automated guideline calculator may not be the judge or commissioner signing the order. A clerk or attorney may use the automated worksheet and then provide the printout to the judge or commissioner. An indicator for low-income adjustment applied or not applied was not observed on any of the computer printouts of guideline calculations that were reviewed in the case files.

The large number of support orders entered by default may also contribute to the infrequent application of the low-income adjustment. The party seeking support may be unlikely to propose an order with the adjustment that would result in a lower support amount.

Further, observations over the years of how states apply their guidelines suggest that judges and commissioners either consistently apply a discretionary adjustment or consistently do not apply a discretionary adjustment.

Presumed Income

Based on information compiled by the federal Office of the Inspector General (discussed in Chapter Four), 48 states impute income when income is unknown. Among those states, 35 of them base it on the presumption that the obligor is employed at a full-time, minimum-wage job. This results in a presumed gross monthly income of \$892 per month (\$784 per month net income in California). This is far lower than the income presumed under Family Code section 17400(d)(2), which was \$1,966 per month for one child and higher amounts for more children in fiscal year 1999–2000. The California presumption results in order amounts significantly higher than those ordered in the rest of the nation.

For all other states, the median monthly order amounts—assuming that the obligor is employed full time at minimum wage and the obligee's income is \$0—would be \$152 for one child and \$205 for two children. The range is \$25 to \$223 per month for one child, and \$25 to \$281 per month for two children. In short,

when the obligor's income is unknown, California sets order amounts that are much higher than order amounts in other states.

Regardless of this fact, there are no standards to follow. Indeed, the issue of entering default orders and imputing income when income is unknown has become a national concern. It is frequently a topic at national child support conferences and is a topic the National Child Support Enforcement Association has recommended for further study. The historical premise was that notification of a default order would motivate the noncustodial parent to provide accurate financial information to the courts. Currently, there is no known research to prove or disprove this premise, but several states desire research on the issue.

California applies presumed income in cases being established by the local child support agencies where the obligor's income or income history is unknown to that agency. According to the federal Office of the Inspector General, this is typically in situations where the obligor fails to appear or provide documentation of his or her income. Even in these circumstances, agency caseworkers typically search automated state databases and tax records for income information. If no income or income history is found, a proposed judgment is prepared based upon presumed income (currently \$1,966 per month for one child). If the obligor does not file an answer, a default judgment is automatically entered based upon this presumed amount. The historical premise was that the setting of default orders at high levels would result in noncustodial parents coming forward to provide accurate financial information to the courts. While there is a statutory period for the setting aside of these defaults (see Code Civ. Proc. § 473 and Fam. Code § 17432), obligors who fail to timely set aside the default may be saddled with large arrearages that were never based upon their actual ability to pay support. The Department of Child Support Services' "Collectibility Study" by the Urban Institute, due to be published in December 2001, may provide important empirical data regarding the impact and validity of the current approach to presumed income.

Recommendations Regarding Treatment of Low-Income Obligor

Income Threshold

If California intends to include an income threshold in the child support guideline for application of the low-income adjustment, then the threshold now used to determine the obligor's eligibility—\$1,000 net income per month—should be reviewed. It is higher than that of most states, but close to the amount in high-income states (for example, Connecticut and New York). Also, it exceeds the federal poverty standards for a single person. Nevertheless, the variability in the cost of living among California counties that survey respondents highlighted

is appreciated. In addition, as the obligor's income approaches \$1,000 per month, the amount of the adjustment becomes increasingly small. Under California's new minimum-wage law, many full-time minimum-wage earners will be ineligible for the adjustment or receive only a nominal adjustment.

One difficulty with establishing a fixed threshold is that anyone whose income is even slightly above the threshold may not qualify for a low-income adjustment. Another approach, which could be used either instead of the low-income adjustment or in addition to it, is to incorporate a self-support reserve directly into the guideline to ensure that the obligor has enough income after payment of the support obligation that he or she can maintain at least a minimum standard of living. A discussion of how a self-support reserve could be incorporated into the existing guideline is provided below.

Adjustment Formula

As previously illustrated, there are situations under the existing guideline where payment of the guideline-determined amount would leave the obligor with income below the poverty level for one person. The Legislature should consider the following options as potential approaches to addressing this situation, but these approaches could be considered in combination with other adjustments mentioned in this section:

- Replace Family Code section 4055(b)(7) with an adjustment based on a self-support reserve or adopt a self-support reserve in addition to the low-income adjustment. There are two methods of applying a self-support reserve.

One method is to compute the low-income-adjusted order as a proportion of the difference between obligor net income and the self-support reserve. The proportion could be on a sliding scale that increases with the number of children (for example, 90 percent for one child, 91 percent for two children, 92 percent for three children and so forth).

To illustrate how this would work, assume an obligor has three children and the obligor's net income is \$1,100 per month. The obligor's income available for child support would be \$384 (\$1,100 – \$716, which is the federal poverty level for one person). Under the low-income adjustment, the support order for three children would be 92 percent of this amount, or \$353 per month. This amount would be compared to the guideline-determined amount, and the lower of the two amounts would become the support order.

The other approach is to merely calculate guideline support using all of the obligor's actual income. The guideline support is then subtracted from net

income and if the amount remaining is less than the self-support reserve, the guideline support is adjusted downward until the self-support reserve amount is reached. This is similar to the method adopted by the former Agnos support guideline.

To illustrate how this would work, an obligor with \$1,100 net monthly income and three children would pay \$528 per month in child support by the current guideline. The obligor would be left with \$572 per month after support. If a federal poverty level self-support reserve of \$716 was used, the child support would have to be reduced by \$144 to leave the obligor with the necessary self-support reserve. The resulting child support order would be \$384 per month.

No specific recommendation is made regarding the appropriate amount of any self-support reserve. Comments received during the comment period clearly indicate that a careful balance must be reached between the need to leave obligors with sufficient income to meet their most basic needs and the need to provide as adequately as possible for children.

Other Logistics of the Proposed Formula

The proposed low-income adjustment is an easy formula to program into an automated guideline calculation. It could also be easily incorporated into a guideline worksheet. An example of such a worksheet is provided in Exhibit 4-5.

Applying the low-income adjustment after additions for other child-related expenditures are added on (for example, for child care, health-care costs, education, and special needs) can be problematic. Add-ons are often not set at a dollar amount (they are typically set at 50 percent of actual costs), which would make it difficult to calculate the low-income adjustment after the consideration of additional costs. In the case of uninsured health-care costs, the most frequently applied add-on, this may vary substantially from year to year.

Discretionary Adjustment

If California decides to adopt a self-support reserve or maintain some form of the current low-income adjustment or use a combination of both approaches, these adjustments should be made presumptive to ensure that they will be applied. The intent of enacting a low-income adjustment or self-support reserve is to benefit those who meet the threshold criteria. The current law requires a finding as to why the low-income adjustment is being applied, which may discourage its application. Further, child support orders entered by default will rarely have the low-income adjustment unless it is made presumptive. This situation creates an

additional administrative burden on the courts when these orders must be set aside or subsequently modified. The Legislature should consider adopting or amending current law to make application of these adjustments presumptive subject to proof that the adjustment is not appropriate in a particular case. The current low-income adjustment allows the court to adjust the support within a specified range, which gives the court greater flexibility to consider the overall circumstances of a particular case. However, if this adjustment is made presumptive, the Legislature should consider providing that in default cases or proposed judgments under Family Code section 17400 the low-income adjustment should be set at the maximum amount allowable in order to provide even results on similar facts statewide.

Presumed Income

Application of California's presumed income results in order amounts that are significantly higher than those ordered in the rest of the nation. Among other states, 35 of them base the presumed order on the assumption that the obligor is employed full time at minimum wage. This contrasts with the current California approach, which presumes a monthly income of \$1,966 (for fiscal year 1999–2000) when calculating support for one child. The Legislature should review the current presumed income approach to determine if alternatives would yield a more appropriate child support order. If a lower presumed income was adopted, provisions could be considered for allowing either parent to be able to set aside the judgment, within a clearly circumscribed time period, and recalculate support based upon information subsequently provided.

It is also recommended that the results from the Urban Institute's study on child support debt be considered when released. It may provide further insights in the ability to pay in these presumed income cases.

USE OF GROSS INCOME VERSUS NET INCOME AS A BASE FOR CALCULATING CHILD SUPPORT

Background

California, like 18 other states, uses net income as the base from which to compute a child support obligation. Furthermore, it sums both parents' net income in applying the formula to establish the support obligation.

Under Family Code section 4059, the guideline defines what is meant by net disposable income and specifies the types of deductions that are allowed in computing net from gross income.

Overview of the Income-Base Issue

States have struggled with what income to use as the base for calculating a support obligation ever since child support guidelines were first developed. There are arguments in favor of all the different approaches that states are currently using (see Chapter Four), and the choice of one approach over another appears to be a compromise among many interests within a state. In California, there are two questions about the income base that need to be addressed:

- Should the income base be gross income or net income?
- If the guideline continues to use net income, what, if any, changes are needed to the computation of net income from gross?

In response to the first question, it appears from the guideline users' survey that there is a strong preference for continuing to use net income as the base. In answer to a targeted set of questions about the use of gross or net income, respondents' opinions were (see Chapter Six):

- A plurality believed that net income is *easier to use* than gross income;
- A majority believed that net income is *more equitable to use* than gross income; and
- A majority believed that the guideline *should use* net income rather than gross income to compute support obligations.

As several respondents noted in their narrative remarks, they see the gross versus net income issue as one of fairness, not ease of use. While gross income may be easier or simpler to use, it is not necessarily fair. Respondents liked the fact that the guideline takes account of each individual's tax situation. Moreover, once agreement is reached about what will and will not be counted in gross income, the automated guideline software computes the net income so there is little room for error.

The Family Code and its legislative history provide little in the way of guidance in determining how to equitably allocate tax benefits and liabilities between a remarried party and his or her new spouse to determine net disposable income for child support purposes. Family Code section 4059 is unequivocal in requiring that net disposable income shall be computed by deducting from annual gross income the actual amounts attributable to the state and federal income tax liability. Case law does resolve the apparent conflict between Family Code section 4057.5, which generally prohibits consideration of new mate income in calculating child support, and the mandate of Family Code section 4059, which

requires the court to take into consideration the parties' actual tax consequences in determining net disposable income. Case law provides that Family Code section 4057.5 does not prohibit the court from considering the new mate's income in allocating the tax liability or benefit between the new mate and the remarried partner (*County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 57 Cal.Rptr.2d 902). To illustrate why this is an issue, consider an obligee with gross income of \$1,000 per month who has a child support order for her one child. Prior to remarriage, the obligee filed as a head of household claiming herself and the one child. She marries a man whose gross income is \$10,000 per month. They now file taxes jointly and also claim the child subject to the support order as a dependent. Obviously, her tax consequences have changed. If the child support order is modified, California Family Code section 4059(a) states that the personal income tax deductions shall bear an accurate relationship to the tax status of the parties; hence, consider the tax consequences associated with her joint return with her new spouse.

Recommendations Regarding Use of Gross Income Versus Net Income

The California child support guideline should continue to rely on disposable net income as the base used to compute a support obligation amount. Disposable net income bases support on the actual amount of money that is reasonably available for support. Net income excludes mandatory deductions such as retirement or union dues. Net income also accounts for the differences in tax consequences based on such factors as the availability of dependency exemptions. This approach takes into account that people who are similarly situated with regard to gross income may have quite different levels of net income based on the nature of their deductions and their individual life circumstances.

The Legislature should, however, review the issue of how to allocate the tax consequences between a remarried party and his or her new spouse for the purposes of determining the net disposable income of that remarried party. In resolving this issue, the Legislature should carefully review the various alternatives to determine the most equitable statutory solution (see discussion in Chapter Four). The current gap in guidance in this area can result in a lack of uniform application of the guideline statewide.

ADDITIONAL DEPENDENTS

Background

There are two provisions in the existing guideline of most relevance to additional dependents.

- Family Code section 4059(e) applies to any child support actually being paid for an additional dependent who does not reside with the parent. It simply subtracts the amount paid from the eligible parent's income.
- Family Code section 4071 (the hardship deduction) applies to additional dependents living with the parent. A hardship deduction can be subtracted from the income of the parent of the additional dependent, prior to calculating child support for the prior-born children. The amount of the hardship deduction cannot exceed the support allocated per child subject to the order.

Overview of the Additional Dependents Adjustment

In the guideline users' survey, respondents generally believed that the guideline treats the issue of additional dependents adequately. However, this opinion differed by the identity of the respondent, with respondents from the IV-D child support community rating the adjustment as more adequate and parents rating it as less adequate. The ratings from judges and family law attorneys were in between the ratings of the other groups.

Regardless of these findings, George Norton, a preeminent family law expert, finds a mathematical flaw with the additional dependent adjustment covered under the hardship provision.

- The dollar amount for the hardship deduction could exceed the net income of the eligible parent. Thus, once the deduction is subtracted, the parent with the additional dependent could be left with a negative net income.

Recommendations Regarding Additional Dependents

The California child support guideline's two existing provisions regarding additional dependents appears to adequately address the issue of additional dependents. The guideline should continue to allow a mandatory deduction for child support actually being paid for a child other than the child or children for whom support is being established. The guideline should also continue to allow a hardship deduction for other children (and/or parents) who the party is legally obligated to support and who reside in the home of that party. It should be noted, however, that the latter deduction is discretionary with the court. The court may disallow consideration of the deduction for other dependents completely or allow a deduction in any amount up to the maximum allowable. This discretion allows the court to take into consideration the wide range of circumstances where other dependents are involved. For example, the court can

differentiate the amount of deduction for another dependent not the subject of the order who is solely supported by one parent or supported by two parents.

The case file review indicates that this hardship was only given in 2.5 percent of the total files reviewed and this represents a decline from 6.8 percent in the 1998 review. The present study did not determine in what percentage of cases eligible for this hardship that the hardship was given. While the majority of respondents in the users' survey indicated satisfaction with how the guideline deals with additional dependents, a substantial minority (23 percent) indicated some concern that the current guideline is difficult for those in a multifamily situation (see Exhibit 6-7). Further future study of how this discretionary hardship is being applied may be warranted.

The Legislature should consider correcting a minor mathematical error that occurs if the hardship deduction exceeds the parent's net income, which results in a negative net disposable income for the eligible parent. This can be easily corrected by limiting the minimum amount of net disposable income to \$0. In other words, a parent's net disposable income used in a guideline calculation can never be less than \$0. Similar provisions exist in other states.

THE NEED FOR FURTHER STUDY

The purpose of this review of California's child support guideline is to provide information and recommendations to the Legislature regarding the current status of implementation and operation of the child support guideline in the courts. While this study has provided substantial additional information, there is a clear need for further study both on specific areas not touched on in this review and more detailed study of the topics included in this review.

Child support has an impact on and is impacted by many other social and legal issues. A greater understanding of this complex interplay is needed to inform the public policy decision-making process that has such a great impact on the families of California.

These topics include, to name just a few, the interplay between active participation by a parent through custody and/or visitation and compliance with support orders, the basis of the high rate of default support orders in California, and the impact on the ability to pay support of various social services and other resources currently being offered parents as part of the governmental processing of child support cases.

